

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR07-1052

FRED SCOTT,

APPELLANT

V.

STATE OF ARKANSAS,

APPELLEE

Opinion Delivered SEPTEMBER 24, 2008

APPEAL FROM THE FULTON
COUNTY CIRCUIT COURT,
[NO. CR2006-167(F)]

HONORABLE JOHN N.
FOGLEMEN, JUDGE,

AFFIRMED

KAREN R. BAKER, Judge

Appellant Fred Scott appeals his Greene County jury conviction for first-degree murder arguing that insufficient evidence supports the conclusion that he knowingly murdered his infant son, that the court erred by excluding a videotape of an allegedly similar event, and by allowing reference to the appellant's prior felony conviction. We find no error and affirm.

Appellant's first assertion is that there was no substantial evidence to support his conviction for first-degree murder. A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Gikonyo v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Apr. 30, 2008). The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the appellee

and consider only the evidence that supports the verdict. *Id.* The credibility of witnesses is an issue for the fact finder and not for the appellate court. *Id.* The fact finder may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Id.*

Although appellant claims he did not knowingly kill his son, substantial evidence supports the jury's determination that appellant acted knowingly. An accused acts knowingly with respect to his conduct or to the attendant circumstances when he is aware that his conduct is of that nature or that the attendant circumstances exist. See Ark. Code Ann. § 5-2-202(2)(A) (Repl. 1997). Appellant was solely responsible for caring for his son on September 27, 2005, when his wife, who was the mother of the seven-week-old victim, left for her first full day back at work after giving birth to the child. Sometime that day, before the mother returned home from work, the child suffered the injuries that led to his death. Detailed medical evidence established the severity of the injuries and that the injuries were caused by severe trauma inconsistent with the explanations provided by appellant. One medical physician opined that the victim's injuries were so severe that they were more consistent with a severe head injury along the lines of being ejected from a car in an accident. Appellant gave conflicting stories regarding the events, the circumstances, and his actions involving the infliction of the injuries. Appellant's inconsistent and conflicting statements and behavior were additional evidence of guilt for the jury to consider. See *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001). Accordingly, we find no error in the trial court's refusal to grant a directed verdict.

Appellant's second assertion of error is that the trial court abused its discretion by excluding the videotape of a two-year-old child falling and hitting her head on a concrete floor, getting up and running around, and then collapsing a few minutes later. Our supreme court has noted that trial courts have broad discretion with regard to evidentiary rulings, and when reviewing a ruling on the admissibility of evidence, the trial court should not be reversed absent an abuse of that discretion. *Owens v. State*, 363 Ark. 413, 214 S.W.3d 849 (2005). See also *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

Rule 402 of the Arkansas Rules of Evidence provides that irrelevant evidence is inadmissible. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The test of admissibility of evidence over an objection for irrelevancy is whether the fact offered into proof affords a basis for rational inference of the fact to be proved. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003). It is sufficient if the fact may become relevant in connection with other facts, or if it forms a link in the chain of evidence necessary to support a party's contention. *Id.* at 198, 119 S.W.3d at 492. Even if relevant, evidence may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403; *Simmons, supra*.

The trial court found that showing the incident depicted on the videotape would be more prejudicial than probative. In making the ruling, the court stated that the witness, Dr. John Plunkett would be allowed to testify about the depicted accident, as it was on the cases

he reviewed in developing his opinion about the cause of the victim's death. The circuit court also stated that the video contained hearsay and was not relevant. In this case, Dr. Plunkett testified about the contents of the video. The exclusion of certain testimony cannot be considered prejudicial where the testimony was previously introduced through another witness. *See Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991). Here, the expert introduced the case depicted on the video so that the testimony itself, rather than the video, was presented to the jury. Accordingly, the trial court did not abuse its discretion when it refused to allow the viewing of the videotape.

Similarly, the trial court did not abuse its discretion when it allowed the State to impeach appellant's credibility on the stand with his prior felony convictions as appellant asserts in his third point of error. Rule 609(a) of the Arkansas Rules of Evidence provides:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

Appellant argues that the trial court erred in admitting evidence of his conviction because the trial court failed to weigh whether the misconduct leading to the conviction related to truthfulness or untruthfulness or that character trait. In making this argument, he relies upon *Balentine v. State*, 259 Ark. 590, 535 S.W.2d 221 (1976). The court in *Balentine* held that when a defendant testifies in his own defense, he may be asked, in good faith, about other crimes he may have committed for the purpose of testing his credibility, but he cannot

be asked if he has been charged, indicted or accused of other crimes. The focus of the inquiry was upon other acts, not convictions. *See id.*

Appellant also relies upon *Watkins v. State*, 320 Ark. 163, 895 S.W.2d 532 (1995). The court in *Watkins* explained the court's duty of inquiry when there is no evidence of a felony conviction:

Under Ark.R.Evid. 609(a), it is provided that

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

According to *Watkins*, his counsel should have been able, under Rule 609(a), to ask Alden whether he had ever stolen a gun. Yet nowhere in the record does there appear proof that Alden had been convicted of an offense entailing one year or more imprisonment or involving dishonesty or false statement, a prerequisite under Rule 609(a).

Further, *Watkins's* effort to cross-examine Alden was denied specifically on the basis of Rule 608(b), which focuses on the character of the witness for truthfulness or untruthfulness. Whether Alden had previously stolen a gun was not probative of truthfulness. *See Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982), where we held that an absence of respect for the property rights of others, though an undesirable trait, does not directly indicate an impairment of the trait of truthfulness. The trial court did not err in refusing to permit cross-examination of Alden with respect to the previous theft of a gun.

Watkins v. State, 320 Ark. 163, 168, 895 S.W.2d 532, 534-35 (1995).

Appellant in this case is correct that his prior felony conviction did not involve a crime of dishonesty; however, it was punishable by more than one year in prison, which alone subjects him to the impeachment provisions of Rule 609. The admissibility of prior

convictions must be decided on a case-by-case basis, but it is well-established that the State has a right to impeach the credibility of a witness with prior convictions under Rule 609 of the Arkansas Rules of Evidence. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004). The trial court has considerable discretion in determining whether the probative value of prior convictions outweighs their prejudicial effect, and that decision will not be reversed absent an abuse of discretion. *Id.* If a defendant elects to take the witness stand, the appellate courts have consistently permitted prior convictions to be used for impeachment, even when those convictions are similar to the charges being tried. *Id.* In the present case, appellant's prior felony convictions were not similar to the crime for which he was being tried. Accordingly, we find that the trial court did not abuse its discretion in allowing appellant's prior felony conviction to be used to impeach his credibility.

Affirmed.

GLOVER and VAUGHT, JJ., agree.